United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

ORIGINAL

75-4054

United States Court of Appeals

For the Second Circuit.

VIOLA CHOW,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Review Of
Administrative Agency Action

BRIEF OF PETITIONER

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INDEX

	Page
Table of Authorities	i
Statement of Issues	1
Statement of the Case	2
Statement of Facts	
A. The Deportation Hearing	3
B. The Proceedings before the Board of Immigration Appeals	5
Argument	
I. The Question of Jurisdiction	8
II. The Regulations of the Attorney General are binding on the Board of Immigration Appeals	10
III. The failure and refusal of the Board of Immigration Appeals to permit Petitioner to contest the opinion of the State Department was a denial of due process and of a fair hearing	12
IV. The failure of the Board of Immigration Appeals to comply with the provisions of the Administrative Procedure Act is a violation of due process	13
V. The Petitioner is entitled to every favorable interpretation	13
VI. Extreme prejudice resulted to the Petitioner by reason of the Board's failure to follow its own Regulations	14
Conclusion	15

TABLE OF AUTHORITIES

Cases	Page
Barrese v. Ryan, 203 F. Supp. 880 (D.C. Conn. 1962)	14
Berdo v. Immigration and Naturalization Service, 432 F.2d 824 (CA 5 1970)	12
Bregman v. Immigration and Naturalization Service, 351 F.2d 401 (CA 9 1965)	9
Chin Quong Mew v. Tillinghast, 30 F.2d 684 (CA 1 1929)	12
Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342 (C.A.D.C. 1965)	12
Ex Parte Harumi Motoshige, 6 F. Supp. 792 (D.C.S.D. Cal. 1934)	12
Fong Haw Tan v. Phelan, 333 U.S.6. (1948)	14
Giova v. Rosenberg, 379 U.S. 18 (1964)	9
Garcia-Gonzalez v. Immigration and Naturalization Service, 344 F.2d 804 (Cal. 1965), cert. den. 382 U.S. 840	14
Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (CA 9 1968)	12
Kovac v. Immigration and Naturalization Service, 407 F.2d 102 (CA 9 1969)	12
Low v. Thomas, 163 F. Supp. 945 (D.C.E.D. Pa. 1958)	13
Mississippi Val. Barge Line Co. v. United States, 252 F. Supp. 162 (D.C. Mo. 1966)	12
Radic v. Fullilove, 198 F. Supp. 162 (D.C.N.D. Cal. 1961)	13
United States v. Martin, 467 F.2d 1366 (CA 7 1972)	13
United States v. Perkins, 79 F.2d 533 (CA 2 1935)	12
Vitarelli v. Seaton, 359 U.S. 535 (1959)	12
Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)	13

TABLE OF AUTHORITIES

	Page
Cases	
Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966)	9
Yamada v. Immigration and Naturalization Service, 387 F.2d 214 (CA 9 1967)	9
Yellin v. United States, 374 U.S. 109 (1963)	12
Statutes	
5 U.S.C. Section 552	13
5 U.S.C. Section 553	13
5 U.S.C. Section 554(d)(2)	13
8 U.S.C. Section 1252(b)(3)	11
8 U.S.C. Section 1252(h)	11
8 U.S.C. Section 1253(h) [Act Section 243(h)]	11
Code of Federal Regulations	
8 C.F.R. Section 3.1, et seq	9
8 C.F.R. Section 3.1(d)(2)	10
8 C.F.R. Section 3.1(e)	11
8 C.F.R. Section 100.5	13
8 C.F.R. Section 100.6	13
8 C.F.R. Section 100.1, et seq	9
8 C.F.R. Section 103.8(c)	12
8 C.F.R. Section 242.17(c)	9
8 C.F.R. Section 292.4	9

UNITED STATES COURT OF APPEALS
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VIOLA CHOW,

Petitioner, :

-against- :

IMMIGRATION AND NATURALIZATION SERVICE, :

Respondent. :

----------x

Docket No. 75-4054

BRIEF OF PETITIONER

STATEMENT OF ISSUES

1. Is the failure of an administrative agency to follow its own promulgated rules a denial of procedural due process?

2. Where the same person acts as a prosecutor for the Immigration and Naturalization Service and then sits as Chairman of the Board of Immigration Appeals reviewing the same case, is there a denial of procedural due process?

3. Does the failure of the Immigration and Naturalization Service and the Board of Immigration Appeals to afford the petitioner an opportunity to controvert statements used against her constitute a denial of a fair hearing and due process?

4. Is the Board of Immigration Appeals bound by the provisions of The Administrative Procedure Act?

STATEMENT OF THE CASE

This is a petition to review a decision of the Board of Immigration Appeals dismissing petitioner's appeal from a decision of Immigration Judge Francis J. Lyons, who found the petitioner deportable (deportability is not in issue on this appeal) and denied petitioner's application for withholding of deportation to the Republic of China on Taiwan under Section 243(h) of the Immigration and Nationality Act [8 U.S.C. 1253(h)]. Petitioner also seeks a review of the decision of the Board of Immigration Appeals denying petitioner's motion to the Board to reopen and reconsider.

This case has not been before this court previously.

THE PETITION HEREIN IS TIMELY

The decision of the Board dismissing the appeal is dated August 2, 1974. (A-53)* Petitioner immediately protested the decision by letters dated August 5, 1974 and August 6, 1974. (A-59 and A-61) The formal motion to reopen and reconsider was served on August 15, 1974. (A-62) The decision of the Board of Immigration Appeals denying the motion to reopen and reconsider is dated February 13, 1975 (A-96) The Petition for Review was served and filed on March 21, 1975. (A-2) In reality, the proceeding was actually reopened by the Board of Immigration Appeals in that it sent the entire record back to the Immigration and Naturalization Service for additional data. (A-59, A-61, A-62, A-73, A-74, A-75, A-78, A-80) Thus this petition is timely both as to the order of the Board of Immigration Appeals dated August 2, 1974 and the order dated February 13, 1975.

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*NOTE: The numbers in parentheses refer to pages of the Appendix.

STATEMENT OF FACTS

A. THE DEPORTATION HEARING

Deportability is conceded. The facts hereinafter discussed relate only to the application of the petitioner for withholding of deportation to Taiwan on the ground that she would be subject to persecution if deported there.

The petitioner has been a permanent resident of this country since May 1961. (A-30) She entered the United States under a diplomatic passport on October 19, 1959. (A-26) She has two children, both minors, who are citizens of the United States. She has no relatives in Taiwan. All of her family now resides in the United States. (A-9) At the hearing, before the Administrative Judge on August 2, 1973, petitioner testified that she was gainfully employed and that she had had no difficulty with the law enforcement authorities other than the one incident which was the subject of the deportation proceeding. (A-32) She testified that she would be subject to persecution if she were deported to Taiwan because she agreed with and supported the official position of the United States with regard to the admission of Communist China to the United Nations, with regard to trade and commerce between the United States and Red China, and with regard to the political convictions of the President of the United States and the executive departments of the United States, and with regard to political recognition of Red China by the United States and the free interchange of people between Red China and the United States. (A-31, A-32, A-33) The Administrative Judge took judicial notice of the strenuous and strong

objections by the Taiwan government to the change of policy of the United States with regard to Red China, including the severance of diplomatic relations between the Republic of China on Taiwan and the United States. (A-37) The Immigration Service Trial Attorney offered no proof and conducted no cross examination. (A-35)

Petitioner's counsel requested that the record of one Lei Choun Hsu be made available to prove that the petitioner would be imprisoned or executed in Taiwan, based solely upon her conviction of a crime in the United States and her deportation. (A-35) The Immigration Judge stated that the said record would be made available to petitioner's attorney. (A-35, A-36) The hearing was adjourned to await counsel's examination of the record in the Lei Choun Hsu case. The Immigration Service apparently reported that there was no such record available, and the Immigration Judge so stated in his decision (A-43, A-44) and denied the request for withholding of the deportation, pursuant to Section 243(h). (A-44, A-45)

After the decision of the Immigration Judge was received, petitioner's attorney duly filed a notice of appeal from the decision. (A-46) Petitioner specifically requested oral argument before the Board of Immigration Appeals, stating that the petitioner would file a written brief, and specifically requested that the transcript of the hearing and copies of the exhibits be furnished so that a brief could be prepared. An extension of time was requested to serve the brief by reason thereof.

Despite this request and other requests for the transcript of

the hearing before the Immigration Judge (A-62), it was not until this case was calendared by this court and the Administrative Record was filed by the Immigration Service that the petitioner first received the transcript of the minutes of the hearing before the Immigration Judge.

B. THE PROCEEDINGS BEFORE THE BOARD OF IMMIGRATION APPEALS

After the notice of appeal was filed, before or al argument and before the filing of a brief, the Board of Immigration Appeals returned the entire record of proceedings to the New York District for completion of the record. (A-59, A-62) After the file was returned to New York, the opinion of the Department of State was solicited by the New York District Director, and the answer of the Department of State was incorporated in the Administrative Record. (A-48, A-49, A-50, A-51, A-52) Without notice to the petitioner or her attorney, and without affording petitioner oral argument or the opportunity to file a brief, or an opportunity to reply to or contest the opinion of the Department of State, or even an opportunity to inspect the additional papers in the Administrative Record (letters of the Department of State), the Board of Immigration Appeals dismissed the appeal. (A-53, A-54) In its decision, the Board of Immigration Appeals stated, as did the Immigration Judge, that a check of Service records failed to locate any records relating to Lei Choun Hsu. (A-55) The Board then, at length, discussed and relied upon the opinion of the Department of State in its decision. (A-55, A-56)

Upon receiving the decision of the Board of Immigration Appeals, petitioner's attorney immediately protested the lack of opportunity to have oral argument or to submit a brief, and protested the failure or refusal of the Service to search for the records of Lei Choun Hsu. Counsel requested that the appeal be reopened for processing pursuant to the Code of the Federal Regulations, and that the New York District Director's Office be directed to conduct a real search for the record of Lei Choun Hsu. (A-59, A-60, A-61)

The Board of Appeals refused to take jurisdiction unless a formal motion to reopen and reconsider was made, and petitioner promptly filed such motion on August 15, 1974. (A-62) The motion papers protested the irregularity of the proceedings and again a request was made for a transcript of the minutes of the hearing before the Administrative Judge; and again petitioner protested the refusal to furnish the records of Lei Choun Hsu. (A-62, A-63)

On August 29, 1974, the Appellate Trial Attorney of the Immigration and Naturalization Service directed a communication to the then Chairman of the Board of Immigration Appeals requesting that the Board expedite the case. (A-70) On September 11, 1974, the Board of Immigration Appeals on its own initiative granted oral argument on the motion to reopen. (A-71) On September 13, 1974, petitioner's attorney brought to the attention of the Board the fact that he had been informed by the New York

District Office that the record of Lei Choun Hsu was either in the Buffalo Office of the Immigration Service or was not there, but it did appear that there was such a record in existence. In the same letter of September 13, 1974, petitioner's attorney specifically requested that he be permitted to examine that portion of the file relating to the opinion of the Department of State as to the withholding of deportation. (A-72) Suddenly, on September 24, 1974, petitioner's attorney received an invitation to inspect the file relating to Lei Choun Hsu. (A-73) However, when petitioner's attorney appeared at the District Office, he was permitted to inspect only a portion of the file. He immediately protested this to the Board and protested that the file had not previously been made available to him despite its presence in the New York Office during all the time that the case was being litigated. (A-75) A brief was submitted by petitioner and oral argument on the motion to reopen was had before the Board on October 30, 1974. (A-87) On oral argument, petitioner's attorney again protested that he had not had an opportunity to present evidence to dispute the letters of the State Department and had not had an opportunity to even examine the ex parte record made against the petitioner; and counsel again stated that this was a violation of the Regulations, and a denial of procedural due process. Counsel could not very well argue the merits of the case, since he had not been permitted to examine the two crucial files relating to the withholding of deportation. (A-89, A-90) Counsel also protested against being compelled to argue the case on the merits on the ground that he had

not been apprised that this was other than a motion to reopen. (A-91)

Appellate Trial Counsel for the Immigration Service argued that petitioner was only attempting to gain time by dilatory tactics, but petitioner's counsel pointed out that all the delay in this case had been caused by the Government and not by petitioner. (A-96, A-97)

The decision of the Board of Appeals dated February 13, 1975 denying the motion to reopen was signed by David L. Milhollan, Chairman of the Board of Immigration Appeals. This was the same David L. Milhollan who argued against reopening the appeal on behalf of the Immigration and Naturalization Service in the same case. (A-16, A-20, A-21, A-22)

ARGUMENT

I. THE QUESTION OF JURISDICTION.

At the pre-argument conference before staff counsel, respondent's attorney took the position that this court had jurisdiction to review only the order of the Board of Immigration Appeals denying the motion to reopen and reconsider and that this court did not have jurisdiction to review the order dismissing the appeal, upon the ground that the petition seeking review of the latter order was filed more than six months after the date of said order.

The position of the respondent is incorrect both factually and as a matter of law.

In view of the many decisions declaring that the Court of Appeals has jurisdiction to review a denial of a motion to reopen and reconsider, we need not brief that point.

In this case, the decision of the Board of Immigration Appeals dismissing the appeal is dated August 2, 1974. The formal motion to reopen and reconsider was filed on August 15, 1974. From August 15, 1974 to February 13, 1975, the Board of Immigration Appeals took no action on the motion to reopen. Its decision was made almost six months after the motion was made, and it must be deemed, we respectfully submit, that the Board intended to and did keep in abeyance its original decision of August 2, 1974. The petition for review in this court was served and filed on March 21, 1975, only five weeks after the later decision of the Board of Immigration Appeals. Under the rule established in Bregman v. Immigration and Naturalization Service, 351 F.2d 401 (CA 9 1965), Giova v. Rosenberg, 379 U.S. 18 (1964), Woodby v. Immigration and Naturalization Service, 385 U.S. 276, ~~369~~ 286 n. 20, ~~372~~ 292, and Yamada v. Immigration and Naturalization Service, 384 F.2d 214, 217, 217 n. 5 (see particularly the concession of the Government in its briefs submitted to the Supreme Court in Giova and Woodby), this court has jurisdiction to review both orders.

In this case, in addition, everything that we complain of occurred after the receipt of the case by the Board of Immigration Appeals, when the Board:

1. Failed and refused to abide by the regulations promulgated by the Attorney General (8 C.F.R. Section 3.1 et seq., Section 100.1 et seq., Section 292.4).

2. Considered matter not in the record made before the Immigration Judge.

3. Returned the record to the District Director for completion of the record, but did not return the case to the Immigration Judge for his consideration of the new matter.

4. The Chairman of the Board of Immigration Appeals denied the motion to reopen. This was consistent with his previously formulated opinion, when he had argued as the partisan Appellate Trial Attorney against reopening the appeal. The decision of the Board was dated February 13, 1975, and the only appeal available to petitioner from this action was the Petition for Review presented to this court.

All of these matters will be argued in more detail later in this brief. It is apparent, however, that the decision dismissing the appeal and the decision denying the motion to reopen are so intertwined that both must be considered by this court.

II. THE REGULATIONS OF THE ATTORNEY GENERAL ARE BINDING ON THE BOARD OF IMMIGRATION APPEALS.

The Board of Immigration Appeals repeatedly violated the Regulations promulgated by the Attorney General governing the Board's conduct of the appeal from the decision of the Immigration Judge:

1. It returned the case to the Service for further action without entering a final decision on the merits of the case. [8 C.F.R. Sec. 3.1(d)(2)] We contend that when this was done, the Board reopened the case for all purposes, and any additional matter entered in the record should

have been considered by the Immigration Judge. The deportation statute specifically provides [8 U.S.C. Sec. 1252(h)] that the Special Inquiry Officer (Immigration Judge) has exclusive jurisdiction to determine deportability upon a record made in a proceeding before him. Section 1252 Subd. (b)(3) provides that the alien shall have a reasonable opportunity to examine the evidence against him and to present evidence in his own behalf. This statutory right the Board of Appeals denied to the petitioner when it augmented the record and then acted upon the augmented record without notice to the petitioner. The section also specifically states that "The procedure so prescribed shall be the sole and exclusive procedure (the hearing before the Special Inquiry Officer) for determining the deportability of an alien under this section." This, necessarily, includes the portion of the hearing by the Special Inquiry Officer concerning the withholding of deportation pursuant to Section 243(h). [(8 U.S.C. 1253(h)] It would appear that all the proceedings taken by the Board of Immigration Appeals after the return of the record to the Service and before it rendered its decision dismissing the appeal were void for lack of jurisdiction.

2. The Board of Immigration Appeals denied petitioner's counsel the right to have oral argument before the Board. When a request for oral argument is included in the Notice of Appeal, it is mandatory for the Board to grant such argument. [8 C.F.R. Sec. 3.1(e)]

3. The Board refused to permit petitioner's attorney to file a brief. [8 C.F.R. Sec. 3.3(c)]

4. The Board failed or refused to comply with the repeated request of petitioner's attorney for the transcript of the hearing, which is a part

of the "record of proceeding". [8 C.F.R. Sec. 103.8(c), 8 C.F.R. Sec. 103.10 (2)(b)(ii)]

5. The Board failed to remit the proceedings to the Special Inquiry Officer for proper action, and/or failed to inform the petitioner of the non-record information considered by the Board after the deportation hearing had been held. [8 C.F.R. Sec. 242.17(c)]

The said Regulations promulgated by the Attorney General are binding on the Board, and the failure to follow these Regulations denied the petitioner due procedural process. [Yellin v. United States, 374 U.S. 109, 120, 121 (1963); Vitarelli v. Seaton, 359 U.S. 535, 546, 547 (1958); United States v. Perkins, 79 F.2d 533, 534 (CA 2 1935); Elmo Division of Drive X Co. v. Dixon, 348 F.2d 342 (C.A.D.C. 1965); Mississippi Val. Barge Line Co. v. United States, 252 F. Supp. 162 (D.C. Mo. 1966)]

III. THE FAILURE AND REFUSAL OF THE BOARD OF IMMIGRATION APPEALS TO PERMIT PETITIONER TO CONTEST THE OPINION OF THE STATE DEPARTMENT WAS A DENIAL OF DUE PROCESS AND OF A FAIR HEARING.

The consideration of the letter of the State Department (A-51, A-55, A-56) in the absence of and without notice to petitioner's attorney renders the hearing unfair, as does the reliance of the Board upon such letter without affording the petitioner an opportunity to reply. Ex parte Harumi Motoshige, 6 F.Supp. 792 (D.C.S.D. Cal. 1934); Kovac v. Immigration and Naturalization Service, 407 F.2d 102, 107, 108 (CA 9 1969); Berdo v. Immigration and Naturalization Service, 432 F.2d 824, 845 (CA 6 1970); Cf. Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25, 28 (CA 9 1969 on Petition for Rehearing); Chin Quong Mew v. Tillinghast,

30 F.2d 684 (CA 1 - 1929); Radic V. Fullilove, 198 F. Supp. 162, 164, 165 (D.C.N.D. Cal. 1961)]

IV. THE FAILURE OF THE BOARD OF IMMIGRATION APPEALS TO COMPLY WITH THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT IS A VIOLATION OF DUE PROCESS.

Administrative hearings in deportation cases must conform to the requirements of due process of law and the Administrative Procedure Act. [United States v. Martin, 467 F.2d 1366, 1368 (CA 7 1972)] The Attorney General has promulgated his Regulations governing the Immigration and Naturalization Service expressly pursuant to the requirements of the Administrative Procedure Act. (5 U.S.C., Sections 552, 553; 8 C.F.R., Sections 100.5 and 100.6) Thus, the Immigration Service and the Board of Immigration Appeals are bound by the provisions of the Administrative Procedure Act. In addition to the requirements imposed by case law for the separation of functions between prosecuting personnel and adjudicating personnel [Cf. Wong Yang Sung vs. McGrath, 339 U.S. 33, 50 (1950); United States v. Martin, 467 F.2d 1366, 1368 (CA 7 1972); Low v. Thomas, 163 F. Supp. 945, 946 (D.C.E.D. Pa. 1958)], the proceeding herein did not comply with the requirements of the Administrative Procedure Act in that the Chairman of the Board of Immigration Appeals had acted as prosecutor in the argument of the same case before the Board of Immigration Appeals. (5 U.S.C., Sec. 554(d)(2))

V. THE PETITIONER IS ENTITLED TO EVERY FAVORABLE INTERPRETATION.

A deportation proceeding involves the most serious consequences for an alien, and by reason thereof any doubts must be resolved in the

petitioner's favor. [Garcia - Gonzalez v. Immigration and Naturalization Service, 344 F. 2d 804 (CA Cal. 1965), Cert. Den. 382 U.S. 840; Barrese v. Ryan, 203 F. Supp. 880, 887 (1962), quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)]

VI. EXTREME PREJUDICE RESULTED TO THE PETITIONER BY REASON OF THE BOARD'S FAILURE TO FOLLOW ITS OWN REGULATIONS.

If the Board of Immigration Appeals had complied with the Regulations and with the Administrative Procedure Act, petitioner's attorney would have been advised of the State Department's opinion. In its opinion letter, the State Department asked for further facts (A-52), of which request petitioner was not advised. Indeed, the State Department strongly suggested that if the petitioner were to be imprisoned without trial for a crime committed in the United States, it might reconsider its opinion, to wit:

> "The defendant in that case appears to have been tried in Taiwan in a case over which the court there clearly had jurisdiction. No contention is made that the defendant had been tried twice for the same crime." (A-51)

That is exactly our contention. We have urged, and still urge, that Lei Choun Hsu was sentenced in Taiwan for an offense for which he was convicted in the United States, probably without even a trial. Petitioner should have been afforded an opportunity to bring the case of Lei Choun Hsu to the attention of the Department of State for its consideration. Instead, the Immigration Service refused to afford petitioner an opportunity to inspect and answer the State Department letters, in violation of law and in violation of its own Regulations.

The refusal by the Board of Immigration Appeals to reopen the case was arbitrary and capricious, was a gross abuse of discretion, and was contrary to law.

VII. CONCLUSION

Both orders of the Board of Immigration Appeals should be reversed. A new hearing should be directed at which petitioner will have an opportunity to present her proof under Sec. 243(h). The respondent should be directed, in addition, to permit examination of the pertinent record by petitioner's attorney and the presentation of additional facts to the Department of State.

It is respectfully submitted

IRVING E. FIELD
Attorney for Petitioner

FIELD Chow v. Imn.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 5 day of Jan. , 19 76at No. 1 St. Andrews Plaza NYC deponent served the within Brief upon U.S. Attorney 3 the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me.
this 5 day of Jan. 1976

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976